

## THE NEW SHERMAN ACT: A POSITIVE INSTRUMENT OF PROGRESS\*

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### I

THE issue of competition and monopoly is fundamental to the development of legal machinery for the effective and progressive control of the national economy. Competition is not a cure-all for our economic ills. But measures to increase the degree of competition in the organization of economic life are important items in the tool-bag of techniques with which we can reasonably hope to control our economic destiny. The amount of competition we achieve in industrial organization will have a good deal to do with our success in reaching the basic goals of the Employment Act of 1946—high and sustained levels of productive employment in a free society.

The organization of industry and commerce is a matter of central consequence to national policy in at least four basic particulars.

First of all, the degree of monopoly in the business structure is important in relation to the simple problems of economic welfare—whether goods and services cost more than they might, and whether resources and income are being allocated and used in ways which correspond to the preferences of the community.<sup>1</sup> Factors of competition as against monopoly are of direct, though not exclusive importance in determining the rate of technological progress and the rate at which cheaper methods of production are introduced.

It is often assumed that monopoly is the consequence of modern technology, and therefore that a restoration of competitive conditions would involve giving up the advantages of large scale industrial operations. Nothing could be further from the truth. The unit of technological efficiency in modern economic life is the factory, not the firm. Most of the huge combinations of modern business grew in order to achieve the profits of market position, or to provide bankers with new issues to float, not to

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<sup>1</sup> The general literature has become formidable. It is marshalled in Chamberlin, *Theory of Monopolistic Competition* (5th ed., 1946), with supplemental bibliography 56 Q.J. Econ., Part 1, at 160 (1941); Burns, *The Decline of Competition* (1936).

exploit the technological advantages of scale.<sup>2</sup> There is a great deal of evidence, in fact, that on the whole Big Business is less efficient, less progressive technically, and relatively less profitable than smaller business.<sup>3</sup> A program designed to increase the competitive character of business would not in any sense represent a turning back to the horse and buggy days in technology and business organization. On the contrary, such a program has much to offer in helping to eliminate the wastes, the non-use of capacity, and the restrictionism of monopolistic industrial organization.

Secondly, the pattern of industrial organization is to be appraised in connection with the trade cycle. The effect of competitive and monopolistic factors on industrial fluctuations is a matter of some controversy among economists.<sup>4</sup> But all parties to the debate agree that the organiza-

<sup>2</sup> The history of corporations is the best evidence of the motivation for their growth. In instance after instance the motive for growth appears to have been the quest for monopoly power, not the technological advantages of scale. The formation of the Sugar Trust in the eighties, for example, involved the amalgamation of seventeen refining companies, owning twenty out of twenty-six American refineries, representing 78 per cent of refining capacity. The companies subject to the amalgamation were capitalized at \$6,000,000 at the time of their union; the combination was capitalized at \$50,000,000. One result of the combination was the destruction of refineries, as well as price increases. Trade Association Survey, TNEC Monograph No. 18, at 106 ff. (1941); *People v. North River Sugar Co.*, 121 N.Y. 582, 24 N.E. 834 (1890); *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895).

Similarly, in the steel industry the component parts of the United States Steel Corporation were purchased at inflated prices in anticipation of the profits of combination, "upon a scale that was huge and in a manner that was wild." *United States v. United States Steel Corp.*, 223 Fed. 55, 167 (D.C. N.J., 1915), *aff'd* 251 U.S. 417 (1920). Judge Woolley's conclusion—and his analysis was specifically approved by the Supreme Court, 251 U.S. 417, 442—was that "combinations were created by acquiring competing producing concerns at figures not based upon their physical or their business values, as independent and separate producers, but upon their values in combination: that is, upon their values as manufacturing plants and business concerns with competition eliminated. In many instances, capital stock was issued for amounts vastly in excess of the values of the properties purchased, thereby capitalizing the anticipated fruits of combination. The control acquired over the branches of the industry to which the combination particularly related measured by the amount of production, extended in some instances from 80 per cent to 95 per cent of the entire output of the country, resulting in the immediate increase of prices, in some cases double and in others treble what they were before, yielding large dividends upon greatly inflated capital." *United States v. United States Steel Corp.*, 223 Fed. 55, 167 (D.C. N.J., 1915).

Comparable experience can be advanced in many other industries. See, e.g., *The New England Investigation*, 27 I.C.C. 560, 578 ff. (1913), for an account of the building up of the New Haven Railroad system, involving an increase of its capitalization by \$324,000,000 during nine years by financial methods which the ICC characterized as "wasteful in the extreme." *Ibid.*, at 592; *United States Bureau of Corporations, The International Harvester Co.* 1-18, c. 2-4 (1913).

<sup>3</sup> *Relative Efficiency of Large, Medium Sized and Small Business*, TNEC Monograph No. 13 (1941); see Crum, *Corporate Size and Earning Power* (1939); Steindl, *Small and Big Business* (1945).

<sup>4</sup> Lange, *Price Flexibility and Employment* (1944); Lerner, *The Economics of Control* (1944); Neal, *Industrial Concentration and Price Inflexibility* (1942); Bissell, *Prices, Costs and Investment*, 31 *Am. Econ. Rev. Supp.* 200 (1941); Boulding, *In Defense of Monopoly*, 59 *Q.J.*

tion of industry is one of the central problems of trade-cycle theory and policy. Policy towards competition is not one of the direct tools of government for controlling industrial fluctuations, in the sense in which monetary policy, the national budget, taxation, and direct investment can be used to influence the level of the national income. Full employment can be achieved in a monopolistic as well as in a competitive economy. Nonetheless, the degree of monopoly in the business structure can go far to determine the success of governmental policy towards depression or inflation. There is every reason to suppose, for example, that the monopolistic practices sponsored by N.R.A. helped in 1933 and 1934 to choke off a recovery initiated by deficit spending for public works. And the "Recession" of 1937 appears to have been caused almost equally by inept and mistaken government monetary and fiscal policy, and by monopolistic wage increases, weakening incentives to invest.

My own conclusion, though the issue will not be canvassed here in detail, is that a more competitive organization of business should help to make the swings of the trade cycle less severe, to enlarge the number of private investment opportunities and greatly to facilitate the central economic task of modern government—the task of trade-cycle control. A competitive economy should be more responsive than a monopolistic one to government programs designed to maintain and expand the level of national income. A greater degree of competition in industrial organization should reduce the burden of economic enterprise falling on government.

In the third place, and perhaps most important of all, industrial organization has sociological and political results. One of the major problems requiring a social decision in our time is whether we could achieve a wider dispersal of power and opportunity, and a broader base for the class structure of our society, by a more competitive organization of industry and trade, in smaller and more independent units.

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Econ. 524 (1945), and Comments, 60 Q.J. Econ. 612, 615, 619 (1946); Edwards, The Relation of Price Policy to Fluctuations of Investment, 28 Am. Econ. Rev. Supp. 56 (1938); Hansen, Price Flexibility and Full Employment of Resources, in National Resources Comm., The Structure of the American Economy, Part 2, at 27 (1940); Harrod, Imperfect Competition and the Trade Cycle, 18 Rev. Econ. Stat. 84 (1936); Lavington, Monopoly and Business Stability, 6 *Economica* 135 (1926); Mason, Price Policies and Full Employment, in 1 Friedrich and Mason, Public Policy, at 25 (1940); Mason, Price Inflexibility, 20 Rev. Econ. Stat. 53 (1938); Simons, Economic Stability and Antitrust Policy, 11 Univ. Chi. L. Rev. 338 (1944); Wallace, Monopoly Prices and Depression, in Explorations in Economics, Notes and Essays in Honor of F. W. Taussig, at 346 (1936). For another view, see De Haas, Economic Peace through Private Agreements, 22 Harv. Bus. Rev. 139 (1943); Schumpeter, Capitalism, Socialism and Democracy c. 8 (1942).

The extent of competition in the organization of industry will help to determine whether we remain a community long capable of social and political democracy. It should be easier to achieve the values of democracy in a society where economic power and social status are more widely distributed, and less concentrated, than in the United States today.

We live in a community in which power and authority are dispersed. The capacity to make far reaching decisions of social and economic policy—freedom, or sovereignty, if you wish—is shared by many social groups, not concentrated in the state, or any other single social body or agency. The division of power is not equal nor equitable, and there is plenty of room for improvement in the way in which it is distributed. Nonetheless the vital thing is that there is an extensive dispersal of authority, and a good deal of flexibility and movement in the pattern of its dispersal. For some purposes, the national government has final power; for others, state and local governments. Each operates through jealous and independent subdivisions, in an infinite series of checks and balances. The powers of government, however, are limited. There are areas of decision beyond the direct reach of government. There, ultimate power is exercised by corporations and trade unions, farmers and their organizations, trade associations, individual businessmen, and people of wealth and influence, by churches, universities, schools, clubs, and a variety of aggregations and knots of authority which throughout the society either make decisions or influence the way in which they are made.

Federalism, the separation of Church and State, capitalism, the anti-trust tradition, the separation of powers—all the main slogans of our political and social life betray the same jealous preoccupation with the problem of power, and the same healthy suspicion of government or any other overwhelming concentration of authority. We are anarchists by inheritance, willing to concede to Caesar only as much power as circumstances may require.

It is an altogether healthy inheritance. A wide dispersal of authority among autonomous groups is the most important condition of democratic life. In such a society the risk of tyranny is small. There are other dangers—inefficiency, confusion of purpose, slowness to become aware of danger. But it would be almost impossible for a dictator to assemble enough power to dominate a community organized on this principle.

Pluralism in this sense—a wide sharing of power among the many institutions of a free society—is the central problem and the chief goal of our public policy as a whole. There is nothing fixed or static about the division of authority which is appropriate to the achievement of democratic

values. Great changes and shifts are constantly taking place, and should continue to do so. The effective increase in the power of trade unions since 1900, for example, has tended to redress the balance in our social order, and make America less exclusively a society of businessmen and business values. And certainly the economic influence of the national government has radically increased during the same period, under the impact of two wars and a great depression. A modern democratic government must have sufficient power to see to it that the economy is operating at high levels of employment and production. Even the most pluralist of free societies is not automatic or self-operating, and never was. If a democratic government wishes to survive an election, it cannot avoid its primary job of keeping things going—the job of over-all planning and economic control, to use the fighting words of political controversy.

But “full employment” as such is not a sufficient nor an accurate slogan for planning policy. It is an indispensable part of a democratic social program, but not the whole of it. It is no longer possible to doubt that governments can secure full employment. Germany and the Soviet Union have had full employment within their patterns of social organization. The British, the French, and ourselves all had full employment too, during the two wars and at intervals between them. So did Sweden, Australia, New Zealand, Denmark, and other democratic communities. And, like every other inflation in human history, war-time increases in the quantity of money have pushed all the post-war economic systems off to a flying start of full employment—indeed of labor shortage. The problem is not full employment alone, but how to assure employment without imperiling the economic and social basis of freedom. We want our economy to provide men with the jobs, goods, and services they prefer; and we want the economy to be organized in ways which maintain the pattern of dispersed and limited power and thus increase our chances to achieve the values of political and social democracy.

It may be that democratic social values can be sought in societies where authority is concentrated. Certainly a society can be considerably less anarchic than the United States today without losing its chance of freedom. There is a lively academic controversy in full flower as to whether a truly socialist state can be democratic.

Those on one side of the argument contend that if the state owned the means of production, and the essential public facilities, we should be in the position of having everyone work for the same employer. By that fact, they argue, we shall have ceased to be free: economic dependence on the state, and its complete economic power, would give it irresistible political

and social control. If the federal government were the only employer of labor in the United States, a poor fellow who had gotten into the bad graces of the Dies Committee or its equivalent could never get a job. No federal official would dare take the risk of hiring him. The problem is by no means uniquely one for governments. It exists wherever concentrated power exists. The concentration of political power in a single party, or of economic power in a small group of great corporations, has like consequences. In the days before the Wagner Act, to take an instance, it wasn't easy for a union organizer to work, or even to live, in a company town in Pennsylvania or West Virginia.

The other side in the argument contends that even if the state were the sole employer of labor, the secret ballot would protect the people against tyranny, and the bureaucrats would be voted out if they became offensive or ineffective.

One may make two observations about the debate. The first is that we have not so far seen universal power concentrated in the state, or any other body, without imperiling individual freedom. Whatever the other virtues of the Soviet system, it is not easy on dissenters. Nor do oligarchies of wealth or family seem more appealing. Whether in Japan, Czarist Russia, or in some of the commercial, military, or religious states, they have had the same general character.

There is a theoretical case for the possibility of democratic socialism. And there is as well a good practical case for a great deal *more* socialism in western life without enlarging the risk of tyranny. Nonetheless, the chances of democracy are less in a society in proportion to the concentration of power within it. There is less opportunity for tyranny in a pluralist community than in a totalitarian one. As Professor Morris Cohen has remarked, "a government of limited powers, which cannot indoctrinate all its citizens with its dogmas and does not make all of its citizens directly dependent on it for their daily bread, cannot possibly be so dangerous to free thought and to all the achievements of art and science which depend on free thought. In view of the inherent uncertainty of all human arrangements, can we afford the risk of putting all our eggs into one basket and depending on one central government to exercise unlimited power? History does not show any example of genuine intellectual progress under a regime of absolute power. We must allow for variation and research, so that the existing good may not prevent the better from coming into being."<sup>5</sup>

The second thing to be said about the controversy over the possibility of democratic socialism is that in the United States we do not need to come

<sup>5</sup> Cohen, *Faith of a Liberal* 106<sup>7</sup> (1946).

to any conclusion about it. Our economy was not destroyed by the war, nor are our capitalists in jail as collaborators. We do not face the problems or the pressures which are transforming the economic life of Czechoslovakia, Italy, Austria, or, in a different degree, France and England. The ultimate fact about our economy is that it can work. It can be directed in ways which meet the imperative demand for high and stable levels of employment, and steady increases in the general standard of living, without fundamental change in its social character. Our experience, and the development of economic thought during the last thirty years, have hammered out a substantial body of agreed ideas on how the state can manage the economy of a capitalist democracy without the society ceasing to be either capitalist or democratic. If this proposition is a realistic one—and I believe that it is—then there is little need to consider the difficult, strenuous, and very expensive alternative of revolutionary change.

If we can achieve reasonable success in offsetting monopolistic combinations in our economy, it will provide a considerable dispersal of economic power and opportunity—a greater dispersal and mobility than we have seen, at any rate, in any other economic system. This quality is the greatest social virtue of capitalism. For all the profound evils, injustices, and wastes of our economic life, the choice between working to reform it and working for its revolutionary change is not a difficult one. The possibilities of effective reform are far greater than the possibilities of successful social revolution; the risk and costs are far less, the potential gains far greater.

Viewing the problem of industrial organization in its context of social policy as a whole, this much can be said: that monopolistic concentration would make direct state controls and the ultimate socialization of industry far more likely than a regime of competitive smaller business. Concentration works towards enlarging the necessary direct economic control functions of government, and narrowing the permissible scope of private enterprise. In our society monopoly is bound in the end to be regulated or reorganized; government can safely allow it far less freedom than competitive business. Men like Professors Mises and Hayek, and their followers, who fear and distrust the modern state, should especially favor measures to increase the importance of competitive influences in the organization of industry.

The question of monopoly in business has another side—its impact on labor, and on the division of the national income between wage earners and other participants in the productive process. It is a textbook truism that elements of monopoly in the structure of the market for a commodity permit the sellers of the commodity to exploit labor, if it is less monopo-

listically organized than those who hire labor.<sup>6</sup> The cumulative influence of business monopoly is thus to push trade unions into more and more comprehensive patterns of monopolistic effectiveness.

A greater degree of competition in industrial organization is therefore an indispensable part of the economic policy which in our present state of knowledge offers our society its safest chance of meeting the universal demand for full employment and economic security, without ceasing to be free.

## II

The practical effects of the Sherman Act have always been underrated. Because of the futility and confusion of so much antitrust doctrine, we have tended to regard the Sherman Act as a dead letter in American economic life. Actually it has been an important negative factor inhibiting a good many forms of business policy, even in the period of its greatest weakness before the Supreme Court. On the whole, it has helped to prevent in American business many of the extreme forms of monopolistic restriction which characterize German, French, and British industry. It deserves a good deal of the credit for the high productivity and technological drive of many American industries.

With revolutionary speed, however, the doctrine of the Sherman Act has lately been transformed. For the first time since the Supreme Court began to whittle away at it more than fifty years ago, the Sherman Act offers an effective and promising foundation for a program of industrial reform. Recent decisions have given the Department of Justice its greatest opportunity since the act was passed to seek the enforcement of the law on a grand scale, and in ways which might produce not piddling changes in the detail of trade practice, but long strides towards the great social purposes of the statute. If the promise of the recent cases is fulfilled, the act should become a simplified instrument of economic policy, fully adequate to the needs of our time.<sup>7</sup>

Ten years ago Professor Edward S. Mason quite accurately concluded that the conceptions of monopoly in law and economics were different, and were growing more different.<sup>8</sup> In law, he said, monopoly meant not control of the market but restraint of individual behavior.<sup>9</sup> The emphasis was

<sup>6</sup> Robinson, *The Economics of Imperfect Competition*, b. 8 (1933).

<sup>7</sup> See Professor Levi's valuable article, *The Antitrust Laws and Monopoly*, 14 *Univ. Chi. L. Rev.* 153 (1947); *Comment*, 49 *Yale L.J.* 284 (1939).

<sup>8</sup> Mason, *Monopoly in Law and Economics*, 47 *Yale L. J.* 34 (1937).

<sup>9</sup> "The prohibition was suggested by the trusts, the objection to which, as every one knows, was not the union of former competitors, but the sinister power exercised or supposed to be



on freedom of contract, not freedom of competition. For economists, on the other hand, the term monopoly was coming more and more to have an analytical rather than a normative meaning. It referred to the body of ideas about the determination of price and output, and the expected forms of trade practice, in markets dominated by a few sellers, or a few buyers, each capable of influencing market price by reason of its size.

Today, however, Professor Mason's conclusion is no longer tenable. Market control is now a far more important theme in Sherman Act cases than handicaps upon an individual's power to do business. The old pre-occupation of the judges with evidence of business tactics they regarded as ruthless, predatory, and immoral has all but disappeared. We have come a long way towards assimilating the legal to the economic conception of monopoly. We are close to the point of regarding as illegal the kind of economic power which the economist regards as monopolistic.

### III

The idea of monopoly under Section 2 of the statute has the great advantage of neglect. It has been considered separately from Section 1 in very few cases, none of which would stand in the way of a redefinition of the term in the light of our present view of the monopoly problem.

We have learned a good deal about monopoly since the initial dissolution cases in 1911.<sup>10</sup> The word had been given two simple connotations: cases in which there is only one seller of a commodity or service; and cases in which one or a small number of persons have the power to exclude competition. But the word "monopolize" in Section 2 of the Sherman Act is not narrowly limited to these two cases. Freedom of entry of new firms into a field is the key to the economists' distinction between competitive and monopolistic markets: clearly, the entry of new firms governs the total number of firms. Monopolistic markets are those of a single seller, or of a few sellers; and the crucial element of their monopolistic power is a degree of control over the prices they charge. Competitive markets are those of many sellers, no one of whom sells an appreciable fraction of

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exercised by the combination in keeping rivals out of the business and ruining those who were already in." Holmes, J., dissenting in *Northern Securities Co. v. United States*, 193 U.S. 197, 405 (1904). The great Holmes' view on Sherman Act questions were violent. "I don't disguise my belief," he wrote to Pollock, "that the Sherman Act is a humbug based on economic ignorance and incompetence." 1 Holmes-Pollock Letters 163 (1941).

<sup>10</sup> *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

the total supply of the commodity or service on the market,<sup>11</sup> and no one of whom has any discretion as to the price he receives.

Monopoly power is a matter of degree. The extent of the monopolist's control over the prices he charges depends on the availability of substitutes, the nature and elasticity of the demand for his product, the extent to which his product is differentiated in public mind from that of alternative suppliers, and other factors. Nonetheless, he has a measure of discretion as to the price he charges, while the seller in a perfectly competitive market has no choice but to adapt himself to the market price, as best he may in terms of his internal cost conditions. Both the perfect monopolist and the seller in markets where there are few rivals operate in a different economic environment than that of perfect competition. The entry of new firms is at least more difficult and expensive, and therefore the pressure towards a competitive equilibrium is correspondingly reduced. In such circumstances the individual seller naturally does everything he can to increase the degree of his insulation against competitive forces, and therefore the extent of his control over his own price policy.

Substantial deterrents upon the entry of new firms is one of the significant hallmarks of monopoly, in economics and at law. But restrictions on the entry of competitors are evidence of monopoly, not monopoly itself. The new judicial view of monopoly is likely to embrace many market situations in which effective control of price policy is vested in a small number of large sellers, whether or not those sellers overtly conspire together, and whether or not they act to limit the freedom of others to enter the field. Entry can be deterred, after all, as effectively by the size and entrenched power of existing firms as by the threat of economic warfare.

The Supreme Court is on the threshold of recognizing what the economists call monopolistic competition as the offense of monopoly under Section 2 of the Sherman Act. Monopolistic competition is not uniformly defined by the economists. It is used here to embrace a wide range of market situations in which a small number of large sellers produce the decisive share of market supply: The definition would include the parallel situations where a small number of concerns have determining market influence by reason of their position as buyers. Such sellers are conscious in every

<sup>11</sup> Chamberlin, *op. cit.* supra note 1, at c. 3-6; Sweezy, *Demand under Conditions of Oligopoly*, 47 J. Pol. Econ. 568 (1939); Machlup, *Marginal Analysis and Empirical Research*, 34 Am. Econ. Rev. 519 (1946); Machlup, *Practical Significance of the Theory of Monopolistic Competition*, 29 Am. Econ. Rev. 227 (1939); *Competition and Monopoly in American Industry*, TNEC Monograph No. 21 (1941); *Price Behavior and Business Policy*, TNEC Monograph No. 1 (1940), especially Part 1, c. 3, and Parts 2 and 3; Fly, *Observations on the Anti-Trust Laws, Economic Theory and the Sugar Institute Decisions*: I, 45 Yale L. J. 1339, 1340-51 (1936).

phase of their market policy of the fact that what they do will have an effect on the market as a whole. Their output is a significant share of total supply. If they produce more, it can be sold only at a sacrifice of price. If they alter their policy as to price or output, they know that their rivals will follow suit. A price cut therefore can rarely change any seller's share of the market. It can only lead to a decline in the profits of all sellers, unless the elasticity of demand is considerable—and monopolistic sellers habitually underestimate the elasticity of demand for their products. Fear of spoiling the market is therefore a deep-seated and characteristic quality of many markets dominated by a few large firms. Price competition is regarded as "chiselling," a "cutthroat" activity, decidedly unethical and probably vaguely criminal as well. Such interests and attitudes inhibit price competition more effectively than collusion or conspiracy, and they color every aspect of price and production policy.

The economic power inherent in the position of a few large sellers dealing in the major part of the supply coming into a market, and an understanding of their common interest in parallel action, is now regarded by the Court as sufficient to explain many aspects of their behavior—price leadership, fear of spoiling the market, product differentiation, reliance on competitive advertising rather than price competition, and so on. And such a showing of market power is evidence also that they have powers of price control, and the power to deter or limit the entry of competitors, on which a case under Section 1 and Section 2 of the Sherman Act may depend.

Two recent cases, against the background of the last ten years of the Sherman Act in the Supreme Court, mark the new birth of Section 2. The seeds of the doctrine appear in Judge Learned Hand's remarkable opinion in the *Aluminum* case;<sup>12</sup> *American Tobacco Company v. United States*,<sup>13</sup> which explicitly approves and supports Judge Hand's opinion, in some respects carried it into new grounds.

In the *Aluminum* case Judge Hand finally interred and reversed the old dictum that size is not an offense under the Sherman Act. Size, he concluded, was not only evidence of violation, or a potential offense, as in Mr. Justice Cardozo's conciliatory formula of the *Swift* case;<sup>14</sup> it was the essence of the offense. Size, meaning market control, was what competition and monopoly were about. All other aspects of the case were sub-

<sup>12</sup> *United States v. Aluminum Co.*, 148 F. 2d 416 (C.C.A. 2d, 1945), noted in 54 Yale L. J. 860 (1945).

<sup>13</sup> 328 U.S. 781 (1946).

<sup>14</sup> *United States v. Swift & Co.*, 286 U.S. 106, 116 (1932).

ordinated to the central and decisive fact that the Aluminum Company of America, many years after its patents had expired, made, and then fabricated or sold, over 90 per cent of the virgin aluminum used in the United States. Its arrangements with foreign companies for dividing the world markets were further evidence of monopolizing. That it had engaged in deplorable tactics to prevent other companies from entering the field helped compound the offense. But the case was proved, in Judge Hand's view, by showing the company's market power. It made over 90 per cent of virgin aluminum, and therefore had monopoly power. "The producer of so large a proportion of the supply has complete control within certain limits."<sup>15</sup>

The line of the opinion is marred by dicta which somewhat confuse its import. The control of 90 per cent of supply, Judge Hand said, "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four per cent would be enough; and certainly thirty-three per cent is not."<sup>16</sup>

Judge Hand's analysis of the percentage of the aluminum ingot market controlled by the defendants is perhaps the most important part of the case. Alcoa produced 90 per cent of the virgin aluminum used in the United States. Some it fabricated itself, the rest it sold for fabrication to manufacturers. Imports and the recovery of scrap or "secondary" aluminum constituted the only alternative sources. Both imported and secondary aluminum compete with virgin aluminum, and their availability sets limits upon Alcoa's control of price and output. The court included the aluminum which Alcoa fabricated itself as part of "the" commodity being monopolized, on the ground that all fabrications by Alcoa tended to reduce pro tanto the demand for ingots, and that Alcoa's manufacturing activities directly affected the market for ingot. On the other hand secondary supplies were disregarded, although they too directly affected the market for ingot, because the volume of secondary aluminum was over a period of years entirely in the control of Alcoa.

<sup>15</sup> *United States v. Aluminum Co.*, 148 F. 2d 416, 425 (C.C.A. 2d, 1945).

<sup>16</sup> *Ibid.*, at 424. This formula is having an unfortunate effect, being used literally and out of context. See Comment, 56 Yale L. J. 77, 95, referring to the use in the Hartford-Empire decree of the figure of 65 per cent as a benchmark of monopoly. In that instance, if the machines leased by a glass machinery manufacturer produce less than 65 per cent of a particular product, a less severe rule for royalty determination is applied. Moreover, in approving the sale of the government's Geneva, Utah, steel plant to the United States Steel Corporation as war surplus, the Department of Justice invoked Judge Hand's analysis of the market power of Alcoa as a "rule," proving that there was no violation of the antitrust laws because the Corporation's steel capacity after acquiring the Geneva plant would be only 32.7 per cent of national capacity and only 39 per cent of Far Western capacity. N.Y. Times, p. 1, col. 4 (June 18, 1946). See Levi, *op. cit.* supra note 7, at 176-77.

In the case of a monopoly of any commodity [Judge Hand said], which does not disappear in use and which can be salvaged, the supply seeking sale at any moment will be made up of two components: (1) the part which the putative monopolist can immediately produce and sell; and (2) the part which has been, or can be, reclaimed out of what he has produced and sold in the past. By hypothesis he presently controls the first of these components; the second he has controlled in the past, although he no longer does. During the period when he did control the second, if he was aware of his interest, he was guided, not alone by its effect at that time upon the market, but by his knowledge that some part of it was likely to be reclaimed and seek the future market. That consideration will to some extent always affect his production until he decides to abandon the business, or for some other reason ceases to be concerned with the future market. Thus, in the case at bar "Alcoa" always knew that the future supply of ingot would be made up in part of what it produced at the time, and, if it was as far-sighted as it proclaims itself, that consideration must have had its share in determining how much to produce. How accurately it could forecast the effect of present production upon the future market is another matter. Experience, no doubt, would help; but it makes no difference that it had to guess; it is enough that it had an inducement to make the best guess it could and that it would regulate that part of the future supply, so far as it should turn out to have guessed right. The competition of "secondary" must therefore be disregarded, as soon as we consider the position of "Alcoa" over a period of years; it was as much within "Alcoa's" control as was the production of the "virgin" from which it had been derived.<sup>17</sup>

Judge Hand's argument is unmistakable. One of the purposes of the Sherman Act, Judge Hand wrote, "was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other."<sup>18</sup> The development of the statute has made it entirely clear that certain types of contracts and combinations, creating power over price, are completely outlawed. "It would be absurd to condemn such contracts unconditionally, and not to extend the condemnation to monopolies; for the contracts are only steps toward that entire control which monopoly confers: they are really partial monopolies."<sup>19</sup> The offense of monopolizing under Section 2 of the act thus includes the acquisition or retention of effective market control. Monopoly power has boundaries; at all times it confronts competition which limits price—the competition of imported supplies, of alternative commodities, of producers who may be attracted into the market by a sufficiently high level of prices. Nonetheless the existence of market control will suffice to prove a case under Section 2, Judge Hand said, unless it can be shown that monopoly power was inevitable, or was "thrust upon" the monopolist. No predatory or illegal tactics need be shown, and no specific evidence of "intent." The court will

<sup>17</sup> *United States v. Aluminum Co.*, 148 F. 2d 416, 425 (C.C.A. 2d, 1945).

<sup>18</sup> *Ibid.*, at 429.

<sup>19</sup> *Ibid.*, at 428.

assume that the monopolist knows what he is doing, and is not sleep-walking. The dicta of the *Steel* case, and of *United States v. International Harvester Co.*, were disapproved.<sup>20</sup> Judge Hand's opinion is a practical and feasible restatement of the conception of monopoly, giving the law new and far-reaching scope.

This essentially economic approach to the problem of the Sherman Act, which promises drastically to shorten and simplify antitrust trials, is advanced much closer to the problems of many large industries by the *Tobacco Company* case. The defendants in the litigation—a criminal proceeding in four counts under both Section 1 and Section 2 of the Sherman Act—were the three great companies which together sell something like three-quarters of all the cigarettes sold in the United States, or about four-fifths of the standard priced cigarettes, as well as a large volume of other tobacco products. These three companies are not integrated. They buy their raw materials from numerous sellers in tobacco markets scattered throughout the growing areas; then they manufacture their products, and sell to jobbers, and to a lesser extent to dealers, directly. There is no attempt at exclusive selling arrangements, but the major companies have had identical discount allowances for jobbers and dealers at least since 1928. The jury found the defendants guilty of conspiring to restrain trade, of monopolizing, of attempting to monopolize, and of conspiring to monopolize. There was found to be both monopoly and restraint of trade—that is, both Section 2 and Section 1 offenses—in the markets for leaf tobacco, where the manufacturing companies bought their raw materials, and in the market for cigarettes. The three big companies used the economic power inherent in their size, the jury found, to buy cheap and to sell dear, and to keep independent competition in the industry to a controlled minimum.

Two of the three big cigarette companies were descendants of the American Tobacco Company ordered dissolved by the Supreme Court as a combination in restraint of trade and a monopoly in 1911. Each of the three big companies made between 20 per cent and 30 per cent of American cigarettes—the percentages varied each year as between the three. In 1931, the three companies between them made 90 per cent of the small cigarettes produced in the United States, and in 1939, 68 per cent. The percentage of major company production fell during this period, although their absolute production as a group increased. The major company output did not increase as fast as total supply. There were six small com-

<sup>20</sup> *Ibid.*, at 430; *United States v. United States Steel Corp.*, 251 U.S. 417 (1920); *United States v. International Harvester Co.*, 274 U.S. 693 (1927).

panies, three of which produced only ten cent brands of cigarettes. These smaller competitors increased their production and their share of the market throughout the depression and post-depression period.

In the country auctions at which leaf tobacco is sold, the major companies in effect chilled the bidding. Their representatives would bid only if all three companies were represented. They were under common instructions as to the top limit of their bidding, and as to the fraction of the supply they needed. Each would bid against the others up to the maximum, to make certain that all were on an equal footing so far as the cost of raw materials was concerned. The companies in effect further eliminated competition in buying by specializing in certain grades of tobaccos in which the others would be less interested. The sellers preferred to sell to manufacturers rather than to speculators, since the manufacturers could usually pay somewhat more for the crop. Thus the auctions were in large part ritualistic, for the Big Three had determined in advance the price that would prevail and the division of the supply between the buyers. They had also established a "substantially impregnable defence,"<sup>21</sup> Mr. Justice Burton said, against the entry of competition at their expense.

There was practically no overt evidence of combination or conspiracy in developing this price policy. The jury inferred such an understanding on the part of the big companies out of their continued course of action. Actually, the responses of the major companies to the leaf market did not require agreement to be effective. They represented the kind of parallel action which a minimal concern for self-interest would invariably dictate under the circumstances of the tobacco market. The Big Three had nothing to gain and everything to lose by bidding against each other. Each knew that what he did would influence the conduct of the others. Therefore, by agreement or by dumb show, the representatives of the Big Three bought at auctions in such a way, the Court found, as to dominate the price and divide the supply according to their wishes. It would have been difficult if not impossible for the companies making three-fourths of American cigarettes not to dominate price in a market where they were the chief buyers, and the sellers consisted of thousands of unorganized farmers, who had to sell at whatever the market would bring.

In the cigarette market the Court similarly found that the Big Three had the power to control prices and to restrict the entry and development of competing firms. Between 1928 and the date of the proceedings, there had been seven changes in the identical list prices and discounts at which the Big Three sold cigarettes. In each case the change had been announced

<sup>21</sup> *American Tobacco Co. v. United States*, 328 U.S. 781, 800 (1946).

by Reynolds and immediately followed by the other two companies. Arrangements were made to have all price changes simultaneous in effective date. In 1931, Reynolds raised its list price from \$6.40 to \$6.85 a thousand. This increase, taking place at the depth of the depression, as the demand for cigarettes and other commodities declined with the fall in national income, was in itself an extraordinary assertion of market power. Reynolds said that the purpose of the increase was "to express our own courage for the future and our own confidence in our industry."<sup>22</sup> The President of the American Tobacco Company, however, explained that the increase was made in order to give the companies "the opportunity of making some money."<sup>23</sup> The other two big companies followed Reynolds. If they refused to follow, Reynolds would inevitably have reversed its course, so they would have gained nothing from refusing to follow. On the other hand, if they followed Reynolds' price lead, they would share the potential profits of the experiment generally with Reynolds, or at worst would lose no more than the price leader. As the spokesman for Liggett & Myers rather naively put it, his company thought the price rise was a mistake, but felt that unless it followed suit it would have less money than the others to spend for advertising, and thus be in a position of competitive disadvantage.<sup>24</sup> The notion of increasing their share of the market by selling more cheaply than the other two big companies clearly never occurred to the policy makers of Liggett & Myers as a practical course.

The 1931 price rise promptly resulted in a stiffening of retail prices, and a falling off in the volume of all the major sales. The sales of ten-cent cigarettes increased from 0.28 per cent of the total sales to 22.7 per cent in sixteen months. At the same time total production fell slightly more than 8 per cent, with the Big Three producing 81.4 per cent rather than 90.7 per cent of the reduced total. Yet the increase in manufacturers' margins was such as to boost profits, despite the falling off in volume, to near-record levels in the worst year of the general depression.

Having discovered empirically that the demand for their product declined in the face of a price increase, at least during a depression, the market leaders reversed their course, and embarked on a campaign to regain the market from the ten-cent cigarettes. In January and February, 1933, the wholesale price of the leading brands dropped twice, the final figure of \$5.50 a thousand being some 14 per cent under the 1931 level of \$6.40 a thousand. A market war ensued. The Big Three found that they could hold their own against the cheaper cigarettes if the price differential were no greater than three cents a package at retail, such being the measure of

<sup>22</sup> *Ibid.*, at 805.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*



consumers' preferences built up by habit, blend, and advertising. When in 1933 the sales of the ten-cent brands had dropped to about 6 per cent of the total, the majors began again to raise their prices, and price increases in 1934, 1937, and 1940 brought the list price back to \$6.53 a thousand, slightly above the point at which Reynolds' great experiment began in 1931.

The merchandising methods used in the course of the price war were considered by the Court at considerable length. Big Three salesmen put pressure on dealers to sell the major brands at not more than a three-cent differential above the ten-cent brands, either by raising the price of the cheaper brands or by lowering the price of the major brands. There was no evidence that the majors attempted to prevent dealers from carrying the cheaper brands, or otherwise to deny them the market. They did not, for example, undercut the price of the ten-cent brands, in order to drive them off the scene. The policy which they sought to enforce was one of a standard price differential of three cents, in their own favor.

The jury found the defendants guilty on all counts of the information. The writ of certiorari limited the issue before the Supreme Court to the correctness of the trial judge's charge under Section 2 of the Sherman Act, defining the crime of monopolizing. "Now, the term 'monopolize' as used in Section 2 of the Sherman Act . . ." the trial judge said, "means the joint acquisition or maintenance by the members of a conspiracy formed for that purpose, of the power to control and dominate interstate trade and commerce in a commodity to such an extent that they are able, as a group, to exclude actual or potential competitors from the field, accompanied with the intention and purpose to exercise such power."<sup>25</sup> The writ specified that appellate review was to be confined "to the question whether actual exclusion of competitors is necessary to the crime of monopolization under Section 2 of the Sherman Act."<sup>26</sup> The Supreme Court upheld the trial court; the power to exclude actual or potential competition, not the actual exclusion of actual competitors, is a hallmark of the offense prohibited by Section 2.

In this case, resting on both Section 1 and Section 2, the charge of conspiracy and combination was thoroughly mixed up with the charge of monopoly. The trial judge had said to the jury that conspiracy was an essential ingredient of the case, and the Supreme Court put in a precautionary statement to the effect that the case could be regarded as a precedent "only in conjunction with such a combination or conspiracy."<sup>27</sup> But the necessary combination was shown by "unity of purpose," without

<sup>25</sup> *Ibid.*, at 784-85.

<sup>26</sup> *Ibid.*, at 784.

<sup>27</sup> *Ibid.*, at 798.

"formal agreement." A course of dealings, action taken in concert, the result and not the form of combination, were held to be sufficient evidence both of combination and of monopoly. A selective review of what the courts had said on the subject earlier led Mr. Justice Burton to support the view "that the material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so."<sup>28</sup> He quoted with approval Judge Noyes' remarks in the circuit court opinion in the *Patten* case "that trade and commerce are 'monopolized' within the meaning of the federal statute, when, as a result of efforts to that end, such power is obtained that a few persons acting together can control the prices of a commodity moving in interstate commerce. It is not necessary that the power thus obtained should be exercised. Its existence is sufficient."<sup>29</sup> And he took the occasion expressly to put the imprimatur of Supreme Court approval on Judge Learned Hand's opinion in the *Aluminum Company* case, in which Judge Hand not only held, in an equity suit, that the Aluminum Company had violated Section 2 of the Sherman Act, but that the inducement of self-interest, within the framework of the defendants' market position, was important evidence of its violation.

The *Tobacco* case was one, after all, in which the defendants were held guilty on criminal charges—always psychologically more difficult to sustain than civil proceedings—under Section 2 of the act. There were several defendants, not one as in the Aluminum Company case, yet they constituted a monopoly. The position of Mr. Justice Clarke in the *Reading* case, and of Judge Noyes in the *Patten* case have meaning: in law as in economics, and despite the dictionary, monopoly is an affair of several sellers, as well as of one. Parallel action based on acknowledged self-interest within a defined market structure is sufficient evidence of illegal action. Despite

<sup>28</sup> *Ibid.*, at 811.

<sup>29</sup> *Ibid.*, quoting from *United States v. Patten*, 187 Fed. 664, 672 (D.C. N.Y., 1911). It should be noted that Judge Noyes went on to emphasize that in his view "the power of control amounting to a monopoly must be held by persons acting in concert. No monopoly exists when individuals, each acting for himself, own large quantities of a commodity. Under such conditions none of the evils of monopoly is present." *Ibid.*

In the *Tobacco* case, the Supreme Court referred with approval to *United States v. Reading Co.*, 253 U.S. 26 (1920); *Northern Securities Co. v. United States*, 193 U.S. 197 (1904), and to dicta in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), as well as to lower court opinions in the *Patten* case and in *United States v. International Harvester Co.*, 214 Fed. 987 (D.C. Minn., 1914). No direct reference was made at this stage of the opinion to the supposed leading cases on the meaning of Section 2—*Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911); *United States v. United States Steel Corp.*, 251 U.S. 417 (1920); *United States v. Swift & Co.*, 286 U.S. 106 (1932); *United States v. International Harvester Co.*, 274 U.S. 693 (1927).

the narrow limits imposed on the case by the writ of certiorari, the Court managed to say clearly that the power to control prices *or* to exclude competition is the essence of the offense. In the *Tobacco* case, there were real limits upon the monopolists' capacity to raise the price of cigarettes. The Big Three's price-raising experiment during the depression was far from an unmixed success, from their point of view, and it took almost a decade before they extricated themselves from the enlarged independent capacity their price policy had created. Their wholesale price passed the 1931 point only in 1940, and for several years the Big Three had to be content with a relatively low—though altogether profitable—price level. In fact the net result of their policy was to lose, apparently for good, a considerable share of the market, and of their market control, for in 1939 the Big Three sold only 68 per cent of American production, as compared with 90 per cent in 1931.

But the Court refused to be confused. The unintelligent exercise of monopoly power was no proof that it did not exist, within limits set by the market structure and the facts of life. When three companies produce so large a percentage of market supply, that fact alone is almost sufficient evidence that the statute is violated. Ruthless and predatory behavior need not be shown. The actual elimination of small competitors is unnecessary. The big tobacco companies, in the final analysis, pursued a policy which increased the number of their independent competitors, and, on net, strengthened their position. Parallel action, price leadership, a reliance on advertising rather than price competition as a means of inducing changes in each seller's share of the market, and, above all, size—the market advantage of a small number of large sellers or buyers—these are now key points to be proved in a case of monopoly, or of combination in restraint of trade. From such evidence inferences of combination will be drawn, if cautious pleaders rely on Section 1 as well as on Section 2. But the content of an antitrust case has been enormously limited and simplified, under Section 1 as well as Section 2. Painstaking search for scraps of evidence with a conspiratorial atmosphere are no longer necessary. There need be no parade of small businessmen as witnesses, to testify that they have been driven from the trade, and their lives ruined, by the callous squeeze of monopolistic pressure. Under the *Tobacco* case, the economic fact of monopoly is very close to being the legal proof of monopoly; decisive elements are the power to assert a degree of control over price and output in the market as a whole; and the power to deter or discourage potential competition—even, as Judge Hand said, by embracing “each new opportunity as it opened,” and facing “every newcomer with new

capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel."<sup>30</sup>

More than that is implicit in the case. The power to limit or control the market opportunity of independent sellers is not a major part of the proof required under Section 2. It is, on the contrary, a conclusion derived from the central and fundamental fact of monopolistic power over price. For in the *Tobacco* case it was the Big Three's control over market price which gave them the power to limit if not to exclude the independent tobacco companies. By raising or lowering their prices together they determined the opportunity available to the independent companies. Such powers inhere in the few large sellers who between them produce the dominant fraction of supply. They are the inevitable economic consequences of size, within the structural framework of a market which attaches particular strategic importance to certain elements of control, and sets limits upon the extent to which prices can safely be raised. The writ of certiorari in the *Tobacco* case was technically limited to the issue of excluding competition; but the Supreme Court treated that issue as a subsidiary aspect of monopoly power in its broader sense of power over price.

#### IV

Against the background of these two cases, the immediate question is whether competitive reorganization under the Sherman Act can now be required for the numerous industries which, like the tobacco industry, are dominated by a small number of large units. Steel, automobiles, petroleum, non-ferrous metals, chemicals, motion pictures, electrical equipment—most of the basic areas of the economy are organized along lines which broadly resemble the pattern disapproved in the *Tobacco* case.<sup>31</sup> The Supreme Court did emphasize in the *Tobacco* case the fact that it was one in which charges of combination under Section 1 were linked to those of monopolizing under Section 2. However, the major evidence of combination in the *Tobacco* case was inference from parallel action—evidence which should not be hard to match in any of a dozen industrial situations.

The issue of numbers is one which would arise at the outset of any attempt to invoke the *Tobacco* case as the basis of a program of simplified and streamlined industry-wide antitrust suits. In the *Aluminum* case Judge

<sup>30</sup> *United States v. Aluminum Co.*, 148 F. 2d 416, 431 (C.C.A. 2d, 1945).

<sup>31</sup> See *Levi*, op. cit. supra note 7; *Competition and Monopoly in American Industry*, op. cit. supra note 11; *Trade Association Survey*, op. cit. supra note 2; *Hearings on H.R. 2357 before Subcommittee No. 3 of the House Committee on the Judiciary*, 79th Cong. 1st Sess. (1945); *H.Rep. 1820*, 79th Cong. 2d Sess. (1946).

Hand had remarked in passing that the control of 90 per cent of supply in a market was monopoly, 64 per cent was doubtful, and 33 per cent was almost surely not monopoly. By means of fairly acrobatic analysis, the Aluminum Corporation itself was found to produce more than 90 per cent of the aluminum ingot supply. In the *Tobacco* case, three companies together were found guilty of monopolizing, under circumstances in which they produced between 68 per cent and 90 per cent of effective supply. For other industries, the problem of counting will differ. In the automobile and the steel industries, of course, and in the motion picture industry, the number and relative importance of the large firms falls well within this aspect of the *Tobacco* case precedent. In the oil industry there are about twenty large companies, which together refine and sell at wholesale over 80 per cent of the gasoline supply, under arrangements of market policy which reflect the same basic interests, forces, and drives found objectionable in the *Tobacco* case.<sup>32</sup> The question would have to be confronted, however, whether twenty companies is too large a group to come within reach of Section 2 of the Sherman Act. In Mr. Justice Clarke's opinion in the *Reading* case, long relatively neglected, it was asserted and held that control by a considerable number of sellers over much smaller fractions of total supply carried with it effective and therefore illegal monopoly power.<sup>33</sup> Actually, all the major oil companies do not operate in any one market. They appear in different combinations, and in much smaller numbers, in different regional markets. In all those markets the policy of price and output which prevails, under the impact of the power of the major companies operating there, is effectively monopolistic in pattern—every bit as monopolistic as the policy declared illegal in the *Tobacco* case. It is this result, and not a mechanical rule of thumb as to how many sellers can be

<sup>32</sup> Control of the Petroleum Industry by the Major Oil Companies, TNEC Monograph No. 39 (1941), and Review and Criticism on Behalf of Standard Oil Co. (New Jersey) and Sun Oil Co. of Monograph 39, with Rejoinder by Monograph Author, TNEC Monograph 39a (1941); National Resources Comm., Energy Resources and National Policy (1939); Watkins, Oil: Stabilization or Conservation? (1937); Bain, The Economics of the Pacific Coast Petroleum Industry (vol. 1, 1944, vol. 2, 1945); notes, 45 Yale L. J. 324, 332 (1935); 49 Yale L. J. 761 (1940); 51 Yale L. J. 1338 (1942); 51 Yale L. J. 608 (1941); 59 Harv. L. Rev. 1142 (1946).

Having started the most promising and important antitrust action since the Steel case, in *United States v. American Petroleum Institute*, Civil Action No. 8524 (D. Col., 1940) (and this despite serious shortcomings in the complaint and especially in the prayer for relief), the Department of Justice is reported unofficially to have suspended the proceeding for a second time. N.Y. Times, p. 32, col. 2 (Dec. 18, 1946). It has been suggested, however, that the purpose of the proposed suspension is to strengthen the proceeding, not to weaken it. Ralph, Regional Suits Planned to Replace "Mother Hubbard" Anti-Trust Case, 45 Oil and Gas Journal 140 (Dec. 28, 1946). Such suspension by the Department of Justice, if confirmed, would represent an abandonment of its responsibility to carry forward the mandate of the *Tobacco* case.

<sup>33</sup> *United States v. Reading Co.*, 253 U.S. 26 (1920).

a monopoly, which should be the decisive factor in applying the principles of the *Tobacco* decision.

Beyond the problems of doctrine, however, is the greater problem of remedy. Whether out of wisdom or weakness, this generation of judges seems reluctant to approve Sherman Act decrees which will substantially alter prevailing habits or structures of business organization. They are trust-busters in eloquent language, but in deed their decrees are cautious to the point of futility.<sup>34</sup> The small fines of the *Tobacco* case are an almost comic consequence for such a major piece of litigation. Unless, as now seems unlikely, the government's victory is followed up by an equity proceeding, the case will be without practical effect in the tobacco industry. Even in the *Aluminum* case, decision on the issue of dissolving the Aluminum Corporation of America into some of its constituent technological units—a program which could take place without any conceivable loss in technical efficiency—was postponed until the effect of the government's program of selling war surplus aluminum plants to new companies could be observed.<sup>35</sup> The problem of remedy in the *Pullman* case<sup>36</sup> has become so involved, that the chances of fundamental change in the daily conduct of the Pullman car business have been greatly weakened, although the separation of Pullman car manufacture from operation is a basic step forward of far-reaching consequence, both to the railroad industry and as a precedent in other situations. The ultimate settlement of the *Hartford-Empire* case,<sup>37</sup> recently made public, goes so far as to end the practice of leasing glass-making machinery, which is hereafter to be sold outright,

<sup>34</sup> One might recall the remarks of Senator Reed of Missouri on the occasion of the passage of the Clayton Act: "Oh, this is a great antitrust Congress! Compared with the Congress that put upon the statute books the Sherman Act, we appear as would a lot of wet nurses in comparison with soldiers on the field of battle, arms in hand. If we had the original Sherman Act before this Congress, the 'trust busters' of the present day and generation would shy like a country horse of 15 years ago did at the sight of an automobile. You would not find this Congress using this violent and offensive language of the Sherman Act: 'every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is hereby declared to be illegal.'"

"Well, old John Sherman and the Republicans of that day did pass that law. Their 'little fingers were bigger than our loins.' Theirs was the spirit of the eagle; ours that of the barnyard fowl." 51 Cong. Rec. 15825-26 (1914).

<sup>35</sup> *United States v. Aluminum Co.*, 148 F. 2d 416, 446 (1945). Report of the Attorney General under Section 205 of the War Mobilization and Reconversion Act of 1944, at 74 ff. (Sept. 11, 1945); Roback, *Monopoly or Competition through Surplus Disposal: The Aluminum Case*, 31 *Corn. L. Q.* 302 (1946); note, 54 *Yale L. J.* 860 (1945).

<sup>36</sup> *United States v. Pullman Co.*, 50 F. Supp. 123 (Pa., 1943), 53 F. Supp. 908 (1944), 55 F. Supp. 985 (1944), 64 F. Supp. 108 (1946).

<sup>37</sup> *Hartford-Empire Co. v. United States*, 323 U.S. 386 (1945); Levi, *op. cit.* supra note 7, at 180; Comment, 56 *Yale L.J.* 77 (1946); *United States v. Hartford-Empire Co.*, C.C.H. Trade Reg. Serv. ¶ 57,571 (N.D. Ohio, 1947).

and also calls for the dedication in 1950 of certain patents. While the Supreme Court opinion left it doubtful whether the case would go very far towards restoring competitive conditions in the glass container industry, the new decree offers more promise. And, most extraordinary of all, the decree now on appeal in the *Paramount* case,<sup>38</sup> after a forthright analysis of the structure of monopolistic power in the vitally important motion picture industry, proposes a half-measure solution which could contribute little or nothing to resolving the industry's difficulties.

Yet if our antitrust doctrine has been reoriented, so must our conception of remedy. The gravamen of the offense under Section 2 of the Act, as defined in the *Tobacco* case, is not a conspiratorial agreement, nor a series of trade practices which violate the judges' standards of "normal" or "ethical" business behavior. If the offense is monopoly power in its general sense of market control, or ability to influence price; and if the most important condition of monopoly power is size—size, that is, in relation to the relevant complex of market institutions—then the only punishment which fits the crime is directly to reduce the monopolistic size of the business units which have monopolistic power.<sup>39</sup> Criminal verdicts are of little significance for business violators, unless they are followed by equity proceedings; the fines are trivial and jail sentences are never imposed on respectable businessmen defendants. And the determinations of ultimate responsibility in criminal cases have usually contributed little or nothing to the elimination of monopolistic control. Injunctions against trade practices, and most consent decrees, suffer from a general weakness: they commonly deal with the symptoms, but not the sources, of monopoly power.

Yet if the *Tobacco* case is to become more than an abstract declaration, high in the realm of irrelevance, it must result in decrees which undertake to reduce the size of monopolistic units. Only by such procedures, in industry-wide trials limited to the specific economic problems of market control, can the Sherman Act make its full contribution to an economic policy of democratic progress.

## V

The essence of the problem is illustrated in *United States v. Paramount Pictures, Inc.*,<sup>40</sup> decided by a three-judge court before the decision of the *Tobacco* case, but after that of the *Aluminum* case, and now on appeal by

<sup>38</sup> *United States v. Paramount Pictures*, 66 F. Supp. 323 (N.Y., 1946). See discussion *infra*, at 589-600.

<sup>39</sup> Hale, *Trust Dissolution: "Atomizing" Business Units of Monopolistic Size*, 40 Col. L. Rev. 615 (1940).

<sup>40</sup> 66 F. Supp. 323 (N.Y., 1946).

both sides to the Supreme Court of the United States. The *Paramount* case is an industry-wide equity proceeding against the eight major motion picture companies, the five great producers—Paramount Pictures, Inc., Loew's Incorporated, Radio-Keith-Orpheum Corporation, Warner Bros. Pictures, Inc., and Twentieth Century-Fox Film Corporation—and three lesser companies, Columbia Pictures Corp., Universal Corp., and United Artist Corporation. The complaint rests on both Section 1 and Section 2 of the Sherman Act, and deals with all the trade practices which have been litigated at length and with violence in the motion picture industry for many years—block-booking, restrictions on clearance and on admission prices, and other contractual arrangements alleged to restrict the opportunity of independent enterprise in every phase of the business.

The motion picture industry is one of the major institutions of society for mass communication. For good or ill, its power to spread ideas and values is greater than that of the press or of radio. Policy for the motion picture industry is thus a fundamental challenge to any society, and particularly to a democratic society. In the hands of a government aspiring to tyrannical power, the movies could be a weapon of infinite menace. In the hands of any one social or business group, its potentialities could be almost equally serious.<sup>47</sup>

The American movie industry, for many years sensitive to the risks of offending any important social interest, has pursued a policy of collective self-restraint in the realm of ideas. Under a body known as the Motion Picture Association of America, the companies are bound to a code which provides for unified direction of "higher policy" towards sex, art, politics, religion, and other controversial matters. This central policy-making agency has developed a good many commercial aspects and consequences. The artistic neutrality and safeness of the American movies have arrested their development as a serious art-form. The result has been the develop-

<sup>47</sup> Hutchins and others, *A Free and Responsible Press* (1947); Adler, *Art and Prudence* (1937); Ernst, *The First Freedom* c. 1-3, 6 (1946); *The Motion Picture Industry, A Pattern of Control*, TNEC Monograph No. 43 (1941); Hearings on H.R. 280 before the House Committee on Interstate and Foreign Commerce, 76th Cong. 3d Sess. (1940); Weine, *The Neely Bill* (1940), *Contemp. Law Pamphlets, Pending Legislation Series*, Series 6, No. 1 (1940); Niger, *Recent Developments in the Law of Motion Pictures*, 22 *Film Daily Year Book* 687 (1940); Ernst and Lindly, *The Censor Marches On* c. 5-6 (1940); Moley, *The Hays Office* (1945); Paul and Quintanilla, *With a Hays Nonny Nonny* (1942); *The Payne Foundation Studies, Motion Pictures and Youth* (1933-34); Inglis, *Freedom of the Movies* (1947); Huettig, *Economic Control of the Motion Picture Industry* (1944); *Operation of the Consent Decree in the Motion Picture Industry*, 51 *Yale L.J.* 1175 (1942).

*Interstate Circuit v. United States*, 306 U.S. 208 (1939); *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944); *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946); *Goldman Theatres v. Loew's Inc.*, 150 F. 2d 738 (C.C.A. 3d, 1945); Comment, 49 *Yale L. J.* 87 (1939); 50 *Yale L.J.* 854 (1941).



ment and spread of powerful but childish stereotypes whose psychological and sociological consequences in many realms have never been adequately explored.

On the level of business, the movies have been dominated by great integrated companies which have achieved the power effectively to deny any outside producer access to large or well-placed theatres. Access to the main body of American motion picture theatres is the key to the problems of the movie industry.

Motion pictures are not expensive to make. A good many film classics, like "Open City" or "The Baker's Wife," have been produced at low cost. And the making of films is an art to which diverse talents and viewpoints are attracted. Yet in the United States almost all films which reach the public are made by the five big companies, or their three smaller associated companies. Foreign or independently made films are relegated to a few small theatres, which totally lack facilities for reaching the public at large. This result is achieved simply by confronting potential competition with the assurance that it cannot hope to obtain a showing for its films in the major circuits of major theatres, which seat the bulk of the movie-going public. That assurance is enough to restrict competition to a trickle, and to limit the potential market for foreign or independently produced films.

The major film companies control access to theatres by a Protean variety of trade practices. The practices change with local conditions, and with the changing fortunes of the companies at law. Their object, however, has been constant for many years.

The pattern of the motion picture market is intriguing to the economist for its pathological extremes in monopolistic price making.

The first practice narrowing the movie market is the basic one of leasing films rather than selling them, and of leasing them for limited periods of time, after which they are totally—or almost totally—withdrawn from the market. In effect, this practice exposes current production only to the competition of other current production—as if, in the book market, Shakespeare or George Meredith could be read only in the year of their original publication, except for an occasional short period of revival at the Museum of Modern Art, or at a small, arty reading room on the upper East Side of New York. Films are, of course, copyright articles. But they are not generally released after the copyrights expire. On the contrary, they seem to disappear from view entirely well before that point arrives.

In the second place, a series of practices has developed which severely narrow even the competition among current films. In most larger com-

munities there are a few big downtown theatres—the first-run theatres—and a series of smaller or secondary theatres, usually local in their patronage and cheaper in their admission prices. Prints of films are not expensive, and there is no inherent reason why movies could not be exhibited universally at smaller theatres in less congested areas, where land values, costs, and prices could be much lower than those which now prevail for the large downtown motion picture palaces. The basis of market practice in the industry is to show films first at the larger and more expensive theatres, and to protect those theatres in their superior position by a series of restrictive contractual arrangements. Films are not released to second-run theatres for an extended period after they have completed their downtown runs, but only for a limited time. Third-run theatres are allowed to show films only after another extended period of clearance, and again only for a limited time period. Second- and subsequent-run theatres have been restricted in a variety of other ways in their competition with first run theatres. They have been under contract not to charge less than a fixed admission price, so as to permit the first-run houses safely to set a higher price, which would measure the public's willingness to pay more to see films some months before they could be shown at a neighborhood house. And other restrictive arrangements have been imposed—contracts against double-features, for example, and against gifts as an inducement to customers.

Without restrictive contractual arrangements as to clearance, giving big theatres the first run privilege, it is doubtful whether many big theatres would exist at all. If films were marketed like books, for example, they would be seen almost as quickly in Emporia as in New York, and simultaneously in Highland Park and in the Loop. Under such circumstances, there would clearly be much less incentive to go to the Loop for a movie. From the point of view of the motion picture companies' income, the difference would undoubtedly be very material indeed. For some estimates place the proportion of movie income attributable to the higher priced first-run theatres as high as two-thirds, and in some areas as much as 80 per cent<sup>41a</sup>—a striking tribute to the value of the clearance restrictions as a monopolistic price mechanism.

The major companies have been able to impose these patterns on the market for two closely related reasons—they are big, and thus control an important segment of market supply, and they own or control in many

<sup>41a</sup> Huettig, *op. cit. supra* note 41, at 74-84; The Motion Picture Industry, *op. cit. supra* note 41, at 11.

places a decisive number of the larger theatres. The producing companies became big because they controlled theatres. And their bigness has enabled them to gain direct or indirect control of many more. For once a single producer began to make and distribute a significant portion of the supply, he faced independent exhibitors with new strength. The balance of power shifted in favor of the seller, who was able to gain effective indirect control over many nominally independent theatres by the device of block booking. One film would be sold only on condition that others were taken with it. The large producer assured himself access to theatres, and correspondingly denied it to others. As the large leading companies emerged and grew, they came to appreciate their parallel interests, and the advantages of "Live and Let Live" as a way of doing business. They soon gave up bidding against each other for stars, for example. Now stars are borrowed and lent among the producing companies at rates which the companies fix. And in the realm of exhibition they showed how well they understood their common interest in refraining from competition in admission prices, and in denying films produced outside their own group any access whatever to important theatres. Thus British and French films have almost never been shown in large theatres in the past, and only the most severe threats of counter-measures against American films in the British Commonwealth is winning minute and bitterly resisted major exhibition quotas for British films in the United States. The major companies produce about 80 per cent of the Class A feature pictures; without their product no exhibitor can participate in the business.

The motion picture industry has been a favorite subject for antitrust litigation, both private and public, for many years. The *Paramount* case itself began in 1938 and resulted in 1940 in a consent decree, which purported to set out a long series of permitted trade practices, and a system of arbitration tribunals to determine whether or not they were being enforced. There being general dissatisfaction with the consent decree, and with the arbitration panels established to enforce it, the government filed in 1945 an amended complaint seeking a determination that the basic trade practices of the industry were illegal, that they be enjoined, and that the major companies be required to divest themselves of all ownership interest in theatres, and be confined to the production and distribution of films.

Judge Augustus Hand's disposition of the problems of the case throws a good deal of light on recent developments in the law of Section 1 of the Sherman Act and Section 3 of the Clayton Act, regarding the utilization

of patents and copyrights as devices for general market control.<sup>42</sup> But it was written before the *Tobacco* case was decided, and requires reconsideration in the light of the apparent doctrine of that opinion.

To license a film, Judge Hand said, on condition that it be exhibited at a fixed price is illegal, despite the copyright, at least where such restrictions are part of a general plan for controlling motion picture admission prices, both among the big company distributors, and as between them and their licensees. Here, as in *Ethyl Gasoline Corp. v. United States*<sup>43</sup> and *United States v. Masonite Corp.*,<sup>44</sup> the statutory monopoly, conferred in this case by the copyright laws, is held to give no sanction to a scheme of price control going far beyond the limits of *United States v. General Electric Co.*<sup>45</sup> In the shadow world of these famous cases, Judge Augustus Hand had little trouble in reaching his conclusion. The restriction did not apply to a single patented article or process; its purpose and effect was to establish price policy for a market consisting of many unrelated copyright articles. Here the basic policy to be pursued was the one laid down in the *Cracking Patents* case,<sup>46</sup> the *Ethyl* case and the *Hartford-Empire* case: that the Sherman Act requires competition among ideas and among patents, and severely limits a patentee's or copyright holder's capacity to bring together several patents or copyrights which might enable him to govern the ultimate market served by them. It is a violation of the Sherman Act to use one patent to protect another.

There was, Judge Hand said, a more fundamental objection to such restrictions:

This practice of stipulating minimum admission prices in the contracts of license is illegal in another respect. The differentials in price set by a distributor in licensing a particular picture in theatres exhibiting on different runs in the same competitive area are calculated to encourage as many patrons as possible to see the picture in the prior-run theatres where they will pay higher prices than in the subsequent runs. The reason for this is that if 10,000 people of a city's population are ultimately to see the picture—no matter on what run—the gross revenue to be realized from their patronage

<sup>42</sup> *Hartford-Empire Co. v. United States*, 323 U.S. 386 (1945); *Mercoird Corp. v. Mid-Continent Ins. Co.*, 320 U.S. 661 (1944); *United States v. Masonite Corp.*, 316 U.S. 265 (1942); *Interstate Circuit v. United States*, 306 U.S. 208 (1939); *Morton Salt Co. v. Suppiger Co.*, 314 U.S. 488 (1942); cf. *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); Havighurst, *Legal Status of Industrial Control by Patent*, 35 Ill. L. Rev. 495 (1941); *Patents and Free Enterprise*, TNEC Monograph No. 31 (1941); Zlinkoff, *Monopoly versus Competition*, 53 Yale L. J. 514 (1944); notes, 45 Col. L. Rev. 422, 601 (1945), 51 Yale L. J. 299 (1941). See Barnett, *Patent Property and the Anti-Monopoly Laws* (1943).

<sup>43</sup> 309 U.S. 436 (1940).

<sup>44</sup> 316 U.S. 265 (1942).

<sup>45</sup> 272 U.S. 476 (1926).

<sup>46</sup> *Standard Oil Co. (Indiana) v. United States*, 283 U.S. 163, 175-76 (1931).

is increased relatively to the increase in numbers seeing it in the higher-priced prior-run theatres. In effect, the distributor, by the fixing of minimum prices, attempts to give the prior-run exhibitors as nearly a monopoly of the patronage as possible. This, we believe, to be in violation of § 2 of the Sherman Act, at least when the distributor's own theatres are not exhibiting its picture on a prior-run and it is to theatres other than its own that it attempts to give a monopoly.<sup>47</sup>

Paradoxically enough, Judge Hand ruled that clearance restrictions confined to time and space, but not price, were not automatically illegal, like price-fixing contracts, but were restraints the reasonableness of which was subject to enquiry and judgment. The purpose of such clearance provisions is of course to divert customers from second- to first-run theatres, and, by restricting the access of neighborhood theatres to films, to make it possible for first run theatres to charge higher prices. It is difficult to see why this practice does not, like restrictions as to admission prices, represent an attempt "to give prior-run exhibitors as near a monopoly of patronage as possible," in equal violation of Section 2 of the Sherman Act. But Judge Hand thought that such provisions were like common-law covenants not to compete, legitimate when not unduly extended as to time and area.

. . . licenses between one distributor and one exhibitor with reasonable clearance provisions do not, in our opinion, involve anything unlawful. Such provisions are no more than safeguards against concurrent or subsequent licenses in the same area until the exhibitor whose theatre is involved has had a chance to exhibit the pictures licensed without invasion by a subsequent exhibitor at a lower price. It seems nothing more than an adoption of the common law rule to restrict subsequent exhibitions for a reasonable time within a reasonable area. While clearance may indirectly affect admission prices, it does not fix them and is, we believe, a reasonable restraint permitted by the Sherman Act.<sup>48</sup>

The weakness of the argument lies in its premise: clearance and run provisions are not individual licenses between one distributor and one exhibitor, to permit artists to make as much money as possible from a copyrighted film. Clearance restrictions are part of a systematic pattern of market control, designed to influence not the terms on which Judge Hand's single distributor and single exhibitor do business, but the prevailing price and exhibition patterns in an entire market, embracing thousands of theatres and hundreds of individual films. They are in fact uniform and imposed arrangements, evidencing the monopolistic power of the major distributors. Judge Hand acknowledged this to be the fact, and held the current system of clearance regulations illegal. To restore competitive

<sup>47</sup> *United States v. Paramount Pictures*, 66 F. Supp. 323, 339-40 (N.Y., 1946).

<sup>48</sup> *Ibid.*, at 341.

opportunities to independent exhibitors, the court introduced a new proposal—competitive bidding whenever a distributor offers a film for showing by a non-subsidiary or non-affiliated company.

The evidence we have referred to shows that both independent distributors and exhibitors when attempting to bargain with the defendants have been met by a fixed scale of clearances, runs, and admission prices to which they have been obliged to conform if they wished to get their pictures shown upon satisfactory runs or were to compete in exhibition either with the defendants' theatres or with theatres to which the latter have licensed their pictures. Under the circumstances disclosed in the record there has been no fair chance for either the present or any future licensees to change a situation sanctioned by such effective control and general acquiescence as have obtained. See *Bigelow v. RKO Radio Pictures* . . . . *Goldman Theatre v. Loew's Inc.* . . . . *Youngclaus v. Omaha Film Board of Trade*. . . . The only way competition may be introduced into the present system of fixed prices, clearances, and runs is to require a defendant when licensing its pictures to other exhibitors to make each picture available at a minimum fixed or percentage rental and (if clearance is desired) to grant a reasonable clearance and run. When so offered, the licensor shall grant the license for the desired run to the highest bidder if such bidder is responsible and has a theatre of a size, location, and equipment to present the picture to advantage. In other words, if two theatres are bidding, and are fairly comparable, the one offering the best terms shall receive the license. Thus price fixing and its licensees as well as the noncompetitive clearance system may be terminated, and the requirements of the Sherman Act, which the present system violates, will be adequately met. The administrative details involved in such changes will require further consideration. We are satisfied that existing arrangements are in derogation of the rights of independent distributors, exhibitors, and the public, and that the proposed changes will tend to benefit them all.<sup>49</sup>

Block-booking practices are totally outlawed as tying provisions, through which the seller tries to lease one copyright on condition that another be taken. Pooling of theatres by joint ownership and control arrangements among major companies and independent interests are condemned, although the court would sanction the termination of such pools by major company purchase "so long as the transaction sought to be achieved will not result in an unreasonable restraint of competition in exhibition within the particular competitive area."<sup>50</sup> In a considerable number of situations the court required the divestiture to be accomplished by sale to a party other than one of major exhibitors. The court would not, however, require a general divestiture of theatres by the major producing and distributing companies, or a general limitation on their further purchase of theatre interests.

The court's refusal to require a complete separation of theatre owner-

<sup>49</sup> *Ibid.*, at 346.

<sup>50</sup> *Ibid.*, at 351.

ship from film production and distribution, or to consider the significance of distribution facilities as a separate element of market power, reflects the weakness both in the legal basis of its decision, and in its economic analysis of the dynamic factors in market control.

So far as the law is concerned, Judge Hand's argument depends upon a proposition totally discredited by the *Tobacco* case:

. . . . There is no substantial proof [he said] that any of the corporate defendants was organized or has been maintained for the purpose of achieving a national monopoly, as was the case in *Standard Oil Co. v. United States* . . . . *United States v. American Tobacco Co.* . . . . and *United States v. Aluminum Co. of America.* . . . . The five major defendants cannot be treated collectively so as to establish claims of general monopolization in exhibition. They can only be restrained from the unlawful practices in fixing minimum prices, obtaining unreasonable clearances, block-booking, and other things we have criticized.

If in certain localities there is ownership by a single defendant of all the first-run theatres, there is no sufficient proof that it has been for the purpose of creating a monopoly and has not rather arisen from the inertness of competitors, their lack of financial ability to build theatres comparable to those of the defendants, or from the preference of the public for the best equipped houses and not from "inherent vice" on the part of these defendants. Each defendant had a right to build and to own theatres and to exhibit pictures in them, and it takes greater proof than that each of them possessed great financial strength, many theatres, and exhibited the greater number of first-runs to deprive it of the ordinary rights of ownership. Outside the limits of the trade practices and agreements which we have found to violate the anti-trust laws and which will under the final decree be abolished, there is general competition among all the defendants as well as between them and independent distributors for the exhibition of their various pictures. Record p. 1062.

As was said by the expediting court in the *United States v. The Pullman Co.* . . . . "If there is only one store in a town at which every one trades, that fact does not itself constitute a monopoly in the legal sense. It is only when the merchant maintains his position by devices which compel every one to trade with him exclusively that the situation becomes legally objectionable."<sup>81</sup>

But the precise issue decided by the *Tobacco* case was that a small group of sellers dominant in a market could be treated collectively as a monopoly, in Judge Hand's phrase; and both the *Tobacco* and the *Aluminum* cases are totally at variance with the notion of subjective intent which appears in Judge Hand's opinion and in the *Pullman* case.

The major company defendants, Judge Hand said, owned or controlled only 17 per cent of the motion picture theatres of the United States. But he did not emphasize that they owned or controlled 80 per cent of the first-run theatres, in which the bulk of profits are made, or that in 40 per cent of the ninety-two cities in the United States with populations over

<sup>81</sup> *Ibid.*, at 354.

100,000, the major companies control all the first-run theatres, and that the major companies control all the first-run theatres in twenty-three of the thirty-five key cities which are used as distribution centers by the industry.<sup>51a</sup> Judge Hand's view, however, was that the essence of the case was not ownership of theatres or control of distribution facilities, but restrictive trade practices.

The root of the difficulties we have discovered lies not in the ownership of many or most of the best theatres by the producer-distributors, but in price-fixing, non-competitive granting of runs and clearances, unreasonable clearances, formula deals, master agreements, franchises, block-booking, pooling agreements and certain discriminations among licensees between defendants and independents. These practices, if employed in the future, in favor of powerful independents would effect all of the undesirable results that have existed when the five major defendants and their subsidiaries have owned or controlled numerous theatres in which the defendants' pictures have been exhibited. That such would be the case seems amply demonstrated by the decisions where powerful independent circuits were involved. *United States v. Crescent Amusement Co. . . . Interstate Circuit Inc. v. United States. . . .* If the objectionable trade practices were eliminated, the only difference between such an assumed situation in which the defendants owned no theatres and the present would be the inability of the major defendants to play their own pictures in their own theatres. The percentage of pictures on the market which any of the five major defendants could play in its own theatres would be relatively small and in nowise approximates a monopoly of film exhibition.<sup>52</sup>

The nub of the matter, however, is that under Judge Hand's decision the degree of monopolistic power over prices and market practices exercised by the major companies would not be materially reduced, and this for three reasons: the decision does not substantially change the pattern of theatre ownership, nor of control by the majors over distribution facilities, and it permits the continuation of definite clearance restrictions. The bidding provisions of the *Paramount* decree do not require films to be offered in any specified numbers, or to all theatres. On the contrary, they contemplate that theatres would be graded, and that films would be played first in owned or affiliated theatres, and then, *but only then*, offered to other theatres by categories, and subject to "reasonable" clearance provisions. Such practice would not facilitate the access of independent producers to first-run theatres, nor put independently produced films on an equal footing with films produced by major companies in the market as a whole. The major companies would still have most of their present advantages of size. Entry of new firms would still be deterred by the major companies' control

<sup>51a</sup> The Motion Picture Industry—A Pattern of Control, TNEC Monograph No. 43, at 11 (1941).

<sup>52</sup> *Ibid.*, at 355.



of first-run theatres, and by their capacity to keep them as first-run theatres. They would then confront the independent theatres with enhanced rather than decreased bargaining power. The market for second and subsequent runs would consist of a small number of sellers, conscious of their common interests and accustomed to parallel action, and in most places a larger number of smaller buyers. Under a system of block-booking, at least, the major company paid something to assure itself a tied outlet. Under a system of competitive bidding, the large sellers might realistically expect higher prices and a greater share of ultimate income. It is perhaps no accident that the major companies have recently announced a cut in their production programs. One tested way to increase monopolistic profits is to restrict supply.

It is surprising that no attention was given in the *Paramount* case to the doctrine that the use of patent privileges in ways which violate the Sherman Act, especially when prolonged to the point of habit, is likely to result in severe restraints on the future exploitation of the patents involved. Here, after all, the court found that the defendants had persistently violated the Sherman Act in every imaginable particular by imposing improper conditions on the lease of copyright products. If it had required even so mild a remedy as the complete dedication, royalty-free, or at a "reasonable" royalty, fixed by the court, of all existing copyrights used by the majors in violating the antitrust laws, the film market would have been immeasurably broadened for a good many years to come.<sup>53</sup> Or if, on the analogy of the *Bausch & Lomb* case, the defendants were enjoined for a period of years from taking advantage of the copyright laws at all, new producers would be given the chance to enter the market which for many years has been denied them.

Fundamentally, however, there can be no basic change in the conditions under which films are made and marketed, and no real opportunity for independent producers of films in the American market, so long as the major companies own or dominate existing first-run theatres, and retain the legal power to keep them as first-run theatres. Judge Hand's answer—that others can also build big theatres—is no answer at all, as against the major companies' existing head start, the difficulties of building, the special risks of the additional theatre, and above all, the vigorous efforts of the majors to discourage such activity by independent interests. Entry

<sup>53</sup> *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944); *Hartford-Empire Co. v. United States*, 323 U.S. 386 (1945); *Morton Salt Co. v. Suppiger Co.*, 314 U.S. 488 (1942); *United States v. National Lead Co.*, 63 F. Supp. 513 (N.Y., 1945). Consent decrees in anti-trust cases involving the dedication of patents, or their licensing royalty fee, are listed in a comment in 65 *Yale L. J.* 77, 99-100 (1946).

into the industry will be impossibly handicapped and not really competitive, so long as the existing majors continue to own or to control access to the best theatres. Judge Hand's opinion goes a long way, but it does not alter the major companies' capacity to keep independent competition out of the important part of the market. If the *Paramount* case is reexamined in the light of the *Tobacco* case, it becomes possible to say not only that major companies (or independent circuits) may have local monopolies, but that they are in fact a national monopoly. The essence of their crime is size, and their key weapon of monopolizing is control of access to theatres. Divestiture of their theatres should be enough, along with the contractual restrictions imposed by Judge Hand, to encourage enterprise in the movie industry, with all that such enterprise could mean in an essential area of mass communication; although careful study should also be given to the distinct problems of wholesale distribution, and its place in the prevailing pattern of control.

It is only through the painstaking application of the Sherman Act, case by case, to situations of modern monopoly, that its social and economic potentialities can be realized. The Supreme Court has made progress in articulating doctrinal law. What remains is even more important—to change the law in action. The failure of the Department of Justice to carry forward the case against the American Petroleum Institute, and the weakness of Judge Augustus Hand's opinion in the *Paramount* case, are hardly encouraging portents of what is to come. We are accustomed to a Sherman Act which occasionally sends forth a thunderbolt, but normally slumbers in the law libraries while the concentration of economic power continues to increase. If we continue to worship the law, but to enforce it after that erratic fashion, we can expect by that much to reduce our chances of achieving a freer society.